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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JACOB RENALD SMITH, Defendant and Appellant.	B200371 (Los Angeles County Super. Ct. No. MA032057)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Mangay Chung, Judge. Modified and, as modified, affirmed with directions.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Corey J. Robins and Kristofer Jorstad, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jacob Renald Smith appeals from the judgment entered following his convictions by jury of attempted forcible oral copulation, sexual battery by restraint, sexual battery, two counts of false imprisonment by violence, three counts of forcible oral copulation, forcible rape, three counts of kidnapping to commit forcible oral copulation (including counts 20 & 21), child abuse, three counts of second degree robbery, six counts of assault with a firearm, attempted kidnapping, two counts of first degree residential robbery, two counts of carjacking, elder abuse, false imprisonment of an elder, two counts of dissuading a witness with malice and the use or threat of force, three counts of criminal threats, and four counts of possession of a firearm by a felon, with firearm enhancements, prior prison term enhancements, findings under the "One Strike" law, and an admission that he suffered a prior felony conviction under the "Three Strikes" law. The court sentenced appellant to prison for 100 years to life, plus a determinate term of 77 years. We affirm the judgment.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that appellant committed the above crimes in Los Angeles County. We need set forth in detail below only the facts concerning the offenses at issue in counts 20 and 21 involving Kimberly M. and S.M., respectively.

a. *Kimberly M.'s Testimony Regarding Counts 20 and 21.*

About 8:50 a.m. on March 12, 2003, Kimberly M. was doing laundry in a Lancaster laundromat with her five-year-old daughter, S.M. While Kimberly M. was putting her laundry in a machine, appellant entered the laundromat. Kimberly M. was next to a door, and appellant asked her if it was the bathroom door. Kimberly M. said she did not know, and appellant walked away.

Appellant returned while Kimberly M. was "standing at the laundry." He displayed to Kimberly M. a sawed-off shotgun he was holding in his right hand, and asked for her money. Kimberly M. tried to give money to him. Appellant then told her

to get in the corner of the laundromat. Kimberly M. grabbed S.M., who was running around the laundromat. Kimberly M. and S.M. went to the "far right" corner in the "very, very back of the laundromat."

Kimberly M. testified that while she was moving to the corner, appellant was saying "Don't look at [me] and just get in the corner." When Kimberly M. and S.M. were moving to the corner, they were in front of appellant. S.M. said to Kimberly M., "Please don't hurt my mommy." Appellant replied, "I'm not gonna hurt your mommy. Just get in the corner."

When Kimberly M. and S.M. arrived at the corner, Kimberly M. turned and faced appellant. S.M. was in Kimberly M.'s arms. Kimberly M. put S.M.'s head down on Kimberly M.'s shoulder so S.M. could not see what was happening. Appellant told Kimberly M. to kneel and she complied. Kimberly M. was still holding S.M., and appellant was pointing the firearm at both of them. Appellant said he wanted Kimberly M. to do something for him. Appellant made Kimberly M. orally copulate him in the back corner of the laundromat.

Appellant then said, "Don't look at me." Kimberly M. stayed in the corner and kept her daughter's head down. After a few minutes, S.M. looked up to see if appellant had left. Appellant pointed the firearm at S.M. and said "that means you, too." After a few minutes, appellant left, and Kimberly M. and S.M. fled.

At trial, the prosecutor showed Kimberly M. photographs which she testified depicted the laundromat as it appeared shortly after she was there. There were baskets in the laundromat when Kimberly M. was there.

During cross-examination, Kimberly M. testified appellant walked to the rear of the location where S.M. was doing laundry. She also testified she was already "close to the rear" and was not by the front when the incident started. Appellant ordered Kimberly M., but not S.M., to go into the corner. On her own initiative, Kimberly M. picked up S.M. because Kimberly M. wanted to protect her. During recross-examination, Kimberly M. testified there was a door in the laundromat that was sealed shut. The door was "at the end of the row of washers."

Appellant asked Kimberly M. during recross-examination whether she was within a step or two of the door, and Kimberly M. replied, "Maybe a few. I'm not sure." The distance from the washing machine where Kimberly M. had been standing to the corner was maybe about five or ten feet. Kimberly M. did not know if that was an accurate description, but she remembered giving that description at the preliminary hearing. Kimberly M. testified at trial that five or ten feet was "probably" an accurate description, but "they were the ones that said five or 10 feet."

Appellant's counsel asked Kimberly M. whether the distance in the courtroom between her and him was the distance between where Kimberly M. had been standing at the laundry machine and the corner. Appellant's counsel asked Kimberly M. for her best estimate, and she replied, "About right there. Yeah. Maybe." The court referred to diagram measurements and stated, "I would say approximately 14 feet." The laundry baskets Kimberly M. saw depicted in the photographs could have been at the scene as depicted.

During further redirect examination, the prosecutor asked Kimberly M. whether there were objects between her and the laundromat's front door when she was forced to kneel in the back corner. Kimberly M. replied, "There was a washing machine. Yes, I guess." The prosecutor asked if Kimberly M. knew what kind of objects were there, and she replied that her laundry basket was there, plus "another rolling laundry basket." There was at least one rolling laundry basket where she was doing her laundry.

During further examination, Kimberly M. denied that she could testify accurately as to where the laundry baskets were at the time of the assault. No one was in the laundromat other than Kimberly M., S.M., and appellant. When appellant first talked with Kimberly M. about the restroom, he went past her to the back and tried to open the door.[1] The laundromat was long and rectangular. Kimberly M. denied knowing when certain photographs which appellant had been showing to her in court were taken, and

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[1] It appears there may have been multiple doors at or near the back of the laundromat.

denied knowing who had access to the laundromat between the time police arrived and the time the photographs were taken.

b. *Additional Information.*

Los Angeles County Sheriff's Detectives Elizabeth Sheppard and Randall Prestwich interviewed appellant in prison. He initially denied any wrongdoing and denied having encountered any of the victims, including Kimberly M. and S.M. He later admitted encountering the victims, including Kimberly M. and S.M., but his account of what occurred was less incriminating than the victims' accounts.

As to Kimberly M. and S.M., appellant told police that he entered a Lancaster laundromat to use the bathroom. Kimberly M. asked if he was working. Appellant understood Kimberly M. to be asking whether he was selling drugs. Kimberly M. said she only had a little money. Appellant moved her to the back of the laundromat by the restroom, she started to fight him, and her child was running around. Appellant, upset, displayed a sawed-off rifle to Kimberly M. to intimidate her.

Following the detectives' unrecorded interview of appellant, Prestwich asked appellant if the detectives could repeat their conversation on tape. Appellant agreed and the repeated conversation was tape recorded. The tape and a transcript thereof were admitted in evidence.

2. *Defense Evidence.*

Appellant, who had suffered convictions for residential burglary and possession of a firearm by a felon, denied committing any crimes, denied knowing any of the victims, including Kimberly M. and S.M., and claimed his statement to detectives was coerced.

CONTENTIONS

Appellant claims (1) the trial court erred by denying his *Wheeler* motions, (2) the trial erred by excluding expert testimony that police failed to tape record the entire interview with appellant in order to conceal an improper investigation, (3) there was insufficient evidence to support appellant's convictions on counts 20 and 21, and (4) the prosecutor committed misconduct. Respondent claims the abstract of judgment must be amended to reflect additional court security fees.

DISCUSSION

1. *The Trial Court Properly Denied Appellant's Wheeler Motion.*

a. *Pertinent Facts.*

(1) *Juror No. 4192.*

During voir dire of the prospective jurors, Juror No. 4192[2] testified, in pertinent part, she was unemployed "at the moment" and was separated, her significant other was an accountant, and she had no children. The court asked what her prior line of employment was, and she testified she "worked with Office Depot." The court asked whether she had any special experience in DNA, and the following occurred: "Juror No. [4192]: I watch 'Body of Evidence.' I watch Court TV. [¶] The Court: You watch what TV? [¶] Juror No. [4192]: Court TV. [¶] The Court: Cult? [¶] Juror No. [4192]: Court. Court. The court. [¶] The Court: Oh, Court TV. But beyond Court TV, no special training? [¶] Juror No. [4192]: No. [¶] The Court: No? [¶] Juror No. [4192]: No."

(2) *Juror No. 7514.*

Juror No. 7514 testified, in pertinent part, that he was a retired landscaper who had never been married and had no children. The court asked if he had any prior jury experience, and Juror No. 7514 replied, "No. I just have -- I'm involved on a jury." The court indicated it could not hear him and asked him to repeat what he had said. Juror No. 7514 replied, "Question -- I think it's - it's asking about question 5; right?" The court said, "Actually, question 6, any prior jury experience." Juror No. 7514 said, "Oh, yeah." The court then asked, "How many?" Juror No. 7514 replied, "One for a civil suit." A verdict had not been reached in that case, and Juror No. 7514 was excused from that case.

(3) *Appellant's First Wheeler Motion.*

During the later exercise of peremptory challenges, the People initially accepted the panel twice, including Juror Nos. 4192 and 7514. Appellant subsequently excused a juror and the People then excused Juror No. 4192.

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[2] We refer to the prospective jurors as jurors.

Appellant made a *Wheeler* motion, and represented the following. Juror No. 4192 and appellant were African-Americans, and nothing justified the excusal of Juror No. 4192. The People previously had excused an African-American juror but appellant was not challenging the excusal of that juror because that juror had known appellant from high school. The court found appellant made a prima facie showing of group bias and asked the People to justify the excusing of Juror No. 4192.

The prosecutor represented the following. Appellant previously had excused an African-American juror. The prosecutor had accepted a panel with an African-American juror on it. Juror No. 4192 was unemployed. The prosecutor did not like unemployed people because they did not seem to have much of a stake in the community. Juror No. 4192 was separated. The prosecutor did not know what the circumstances of the separation were.

According to the prosecutor, Juror No. 4192 did not respond when her badge number was called, and it took awhile for her to get to the jury box. The prosecutor believed Juror No. 4192 was having problems understanding English. The court had to ask Juror No. 4192 to repeat several times what she said, and other jurors had to explain what she was saying. Juror No. 4192 was difficult to understand, which raised an issue as to whether she would be able to discuss the case with other jurors during deliberations and make herself understood. The prosecutor questioned whether Juror No. 4192 would understand what other jurors were saying, and whether she would understand the testimony in the case, which would include scientific testimony regarding DNA.

Appellant argued the prosecutor's willingness to accept an African-American juror did not make a *Wheeler* motion inapplicable, the prosecutor's reliance on Juror No. 4192's unemployment was pretextual because the prosecutor did not ask any questions regarding Juror No. 4192's employment, and Juror No. 4192 could have been an unemployed rocket scientist. Juror No. 4192 had an accent, but appellant did not observe Juror No. 4192 experience any problem understanding questions. Appellant did not know whether Juror No. 4192's being slow to respond to her badge number was a sufficient ground to excuse her.

The prosecutor replied Juror No. 4192 had indicated she had been employed at Office Depot. The prosecutor also indicated she had excused all jurors who were slow to respond when called, because if they were not smart enough to figure out the numbers on their juror badges, they probably were not going to understand DNA evidence.

The court noted there was one more African-American left on the panel. The court stated as to Juror No. 4192, "the court is going to make a finding . . . that the People have [provided] . . . sufficient race-neutral explanations for the following reasons: [¶] I note that she was unemployed. I did ask the follow-up where she worked at Office Depot. So there is some education issue. . . . I am not going to say it was abnormally slow. She was somewhat slow to respond to the number."

The court continued, "I recall she was also the one that made a comment about having watched Court TV. I believe that was in response to my questioning about having any special training in DNA, which I don't think was fully responsive, either not fully responsive or she didn't quite understand that scientific-type training might have meant lab training or educational, which is a sufficiently raised neutral explanation to give concern that she might not be able to follow the more technical aspects of the DNA in this case. [¶] The only other comment I make, as an aside, she did indicate she was separated, and there was not a lot in terms of the circumstances that were behind that separation." The court denied the *Wheeler* motion.

The prosecutor indicated that she too was concerned by Juror No. 4192's answer concerning Court TV, because one could not understand what Juror No. 4192 was saying on that issue. It bothered the prosecutor that Juror No. 4192 had replied thus to a court question about DNA. The prosecutor suggested she had asked if any of the jurors had watched CSI, and Juror No. 4192 did not connect that question to Court TV.

(4) *Appellant's Second Wheeler Motion.*

The prosecutor later told the court and appellant that she was going to excuse Juror No. 7514. Appellant objected, the court concluded appellant had made a prima facie showing of group bias, and the court required the prosecutor to explain why she was

going to excuse Juror No. 7514. The prosecutor explained that Juror No. 7514 had entered the courtroom late, and it appeared he had not known where to sit.

The prosecutor also explained that Juror No. 7514 was elderly and a retired landscaper. He was not married, did not have children, and therefore did not have a lot of experience with family life. When asked about jury experience, Juror No. 7514 indicated he had had experience on a civil case but had been excused. The prosecutor interpreted that to mean that Juror No. 7514 either did not understand or had not been listening when the court explained that Juror No. 7514's experience constituted service on a jury. All the other jurors seemed to have grasped the distinction. The prosecutor did not know whether this was because of Juror No. 7514's age or intelligence.

The prosecutor further explained that Juror No. 7514 was rather elderly, and slow to understand, and respond to, questions posed to him. Juror No. 7514 had a speech problem. It was not an accent; the prosecutor believed Juror No. 7514 had some kind of physical speech problem. Such a problem would create difficulties when Juror No. 7514 discussed the case with jurors. Based on the above reasons, the prosecutor did not believe Juror No. 7514 had sufficient understanding to appreciate the DNA evidence in this case.

Appellant conceded Juror No. 7514 spoke slowly and was slow to respond. Appellant noted Juror No. 7514 was the last African-American in the panel. The prosecutor replied it was not a question of Juror No. 7514 speaking slowly. He slurred his words.

The court stated, "As to juror number [7514], the court notes in listening to the explanations -- I was looking at [juror 7514] and was listening to him -- particularly in response to my question, I would not characterize his speech as just slow. It does appear to be very halting, more in a manner that would reflect perhaps some physical problem. [¶] Focusing in on that -- and . . . it was a consistent type of halting speech. The court finds that that is sufficiently -- at least a neutral explanation, particularly in terms of the number of charges and the amount of time that he would probably be spending with the

other jurors." The court denied appellant's *Wheeler* motion. The prosecutor later excused Juror No. 7514.

b. *Analysis.*

Our Supreme Court has observed that "There is a presumption that a prosecutor uses his or her peremptory challenges in a constitutional manner." (*People v. Turner* (1994) 8 Cal.4th 137, 165.) In *People v. Fuentes* (1991) 54 Cal.3d 707, our Supreme Court stated, "This court and the high court have professed confidence in trial judges' ability to determine the sufficiency of the prosecutor's explanations. In *Wheeler*, we said that we will 'rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' (*Wheeler, supra,* 22 Cal.3d at p. 282.) Similarly, the high court stated in *Batson v. Kentucky* [(1986) 476 U.S. 79], that 'the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility,' and for that reason 'a reviewing court ordinarily should give those findings great deference.'. . ." (*People v. Fuentes, supra,* 54 Cal.3d at p. 714.) If substantial evidence supports the trial court's findings, we may affirm them. (*People v. Williams* (1997) 16 Cal.4th 635, 666.)

As for Juror No. 4192, the court accepted the People's explanation that the People excused Juror No. 4192 because she was unemployed. Unemployment is a proper criterion for exercising a peremptory challenge because it suggests a person who has little stake in the community. (Cf. *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099, 1106; *U.S. v. Gibson* (8th Cir. 1997) 105 F.3d 1229, 1232, fn. 2.) The court also accepted the People's explanation that Juror No. 4192 was slow. On a cold record, we give deference to the trial court's findings that the prosecutor's explanation on these issues as to why she excused Juror No. 4192 were bona fide and not sham excuses designed to conceal purposeful discrimination. (*People v. Turner, supra,* 8 Cal.4th at p. 165; *People v. Fuentes, supra,* 54 Cal.3d at pp. 720-721.)

As for Juror No. 7514, the court accepted the People's explanation that Juror No. 7514's speech was slow; the court indicated it was not merely slow but was very halting. The prosecutor was entitled to excuse Juror No. 7514 on the ground the prosecutor

believed Juror No. 7514 might have difficulty discussing the case with other jurors during deliberations. The court was also entitled to consider the fact that, at one point, the prosecutor accepted the panel with Juror Nos. 4192 and 7514 on the jury. (Cf. *People v. Huggins* (2006) 38 Cal.4th 175, 236.)

Appellant suggests a comparative analysis of Juror No. 7514 with other unexcused jurors who were unmarried, without children, elderly, and/or retired provides evidence that the prosecutor excused Juror No. 7514 based on group bias. However, such jurors were not similarly situated with respect to Juror No. 7514, whom the prosecutor excused because the prosecutor believed Juror No. 7514 had a speech problem that might interfere with his functions as a juror. The trial court did not err by denying appellant's *Wheeler/Batson* motions.

2. *The Trial Court Did Not Erroneously Exclude Expert Testimony.*

a. *Pertinent Facts.*

During trial, appellant proffered testimony from T.T. Williams, whom appellant indicated was a police procedures expert. According to appellant, Williams would testify that the failure of detectives to tape their entire interview with appellant constituted improper police procedure and, "based on [Williams's] experience, the reason the police do not tape the whole conversation is to hide improper conduct during the interrogation." Appellant indicated the proffered testimony would support the defense position that law enforcement acted improperly in the present case. The court excluded the proffered testimony on the ground, inter alia, it did not present proper subject matter for expert testimony because it did not pertain to something highly technical or a matter concerning which the jury needed assistance, and Williams would testify only as to things that might have occurred.

b. *Analysis.*

An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) Evidence Code section 801, subdivision (a), states: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an

opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; . . .”

The trial court was not presented merely with a proffer that failure by the detectives to tape the entire interview was improper, but that that failure evidenced that they harbored an intent to conceal an improper investigation. If Williams had testified that the failure by detectives to tape the entire interview was improper, the jury would have been capable of inferring on their own any intent on the part of the detectives to conceal an improper investigation. The trial court reasonably could have concluded that the inference that such intent existed did not involve a subject sufficiently beyond common experience such that expert opinion would assist the jury. Appellant proffered testimony which would not only have presented evidence of police procedures but would have related those alleged procedures to the interview in this particular case and the detectives’ state of mind. The trial court did not abuse its discretion or violate appellant’s right to present a defense or a fair trial by excluding the proffered testimony. (Cf. *People v. Page* (1991) 2 Cal.App.4th 161, 184-189.)

We note the law does not require police to tape record interviews. (*People v. Seaton* (1983) 146 Cal.App.3d 67, 75.) As the court stated in *People v. Wimberly* (1992) 5 Cal.App.4th 773, “the California courts have held that the police have no duty to tape-record a defendant’s interrogation. [Citation.] This result derives from the rule that ‘[t]he police have no obligation to collect evidence for the defense; their duty is to preserve existing material evidence . . . . [Citation.]’ [Citation.]” (*Id*. at p. 791.)

3. *There Was Sufficient Evidence that Appellant Committed the Offenses at Issue in Counts 20 and 21*.

a. *There Was Sufficient Evidence of the Requisite Movement as to Counts 20 and 21*.

Penal Code section 209, subdivision (b)(1), states, in relevant part, “Any person who kidnaps or carries away any individual to commit . . . , oral copulation, . . . , shall be punished by imprisonment in the state prison for life with possibility of parole.” Penal Code section 209, subdivision (b)(2), states, “This subdivision shall only apply if the

movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense."

"Kidnapping to commit [oral copulation] involves two prongs. First, the defendant must move the victim and this asportation must not be 'merely incidental to the [oral copulation].' [Citations.] Second, the movement must increase 'the risk of harm to the victim over and above that necessarily present in the [oral copulation].' [Citation.] The two are not mutually exclusive, they are interrelated. (*People v. Rayford* (1994) 9 Cal.4th 1, 12 . . . [(*Rayford*)].)" (*People v. Shadden* (2001) 93 Cal.App.4th 164, 168 (*Shadden*).)[3]

"For the first prong, the jury considers the distance the defendant moved the victim and the 'scope and nature' of the movement. [Citations.] For the second, it considers whether the movement gave the defendant 'the decreased likelihood of detection' and an 'enhanced opportunity to commit additional crimes.' [Citation.]" (*People v. Shadden*, *supra*, 93 Cal.App.4th at p. 168.)

There is no minimum number of feet a defendant must move the victim in order to satisfy the first prong. (*People v. Shadden*, *supra*, 93 Cal.App.4th at p. 168.) Where movement changes the victim's environment, it does not have to be great in distance to be substantial. (*Id.* at p. 169.)

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[3] We have replaced the word "rape" in the above quote from *Shadden* with the words "oral copulation" since Penal Code section 209, subdivision (b)(1) proscribes kidnapping to commit oral copulation as well as kidnapping to commit rape, and the same analysis applies to both crimes.

The second prong includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape (including the victim's desperate attempts to extricate himself or herself), the attacker's enhanced opportunity to commit additional crimes, and the possible enhancement of danger to the victim resulting from the movement. (Cf. *People v. Rayford, supra*, 9 Cal.4th at pp. 13-14.) The fact that these dangers do not materialize does not mean that the risk of harm was not increased. (*Id.* at p. 14.)

As to the first prong, oral copulation does not require asportation. Nonetheless, there was substantial evidence that appellant forced Kimberly M. and S.M. to move about 14 feet from Kimberly M.'s original location to the back corner of the laundromat. Appellant made Kimberly M. commit the sexual act only after he moved her to the corner. The movement of Kimberly M. and S.M. changed their environment from a location closer to the laundromat's front door and more visible to the public to a more isolated back corner of the laundromat.

As to the second prong, the laundromat was long and rectangular, and appellant forced Kimberly M. and S.M. to travel the distance from Kimberly M.'s original location to the corner under threat of imminent lethal force from a firearm. Appellant's movement of Kimberly M. and S.M. to a more isolated area away from the laundromat's front door and less exposed to public view decreased the likelihood of detection and enhanced appellant's opportunity to commit additional crimes.

We note appellant tried, apparently unsuccessfully, to open the door near Kimberly M. before he made her go to the corner; appellant was thus apparently aware of the limited access to the corner area. There was evidence that various items such as a washing machine and laundry baskets were between Kimberly M.'s location when the crime occurred and the laundromat's front door. The enhanced opportunity to commit additional crimes is demonstrated by the fact that appellant told Kimberly M. that he wanted her to orally copulate him, but he later felonious assaulted and made criminal threats to S.M.

Moreover, it was eminently foreseeable that, once Kimberly M. was in the back of the laundromat, and especially when appellant pointed a firearm at her five-year-old daughter, Kimberly M. might have made a desperate attempt to defend and/or escape with S.M., increasing the risk of danger to both. An increased risk of harm was also manifested by appellant's demonstrated willingness to be violent by continually pointing the firearm at Kimberly M. and S.M. We hold there was sufficient evidence as to each of counts 20 and 21 that appellant committed kidnapping to commit oral copulation. (Cf. *People v. Rayford, supra*, 9 Cal.4th at pp. 12-14; *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1048-1052; *People v. Shadden, supra*, 93 Cal.App.4th at pp. 168-170.) None of the cases cited by appellant compels a contrary conclusion.

b. *There Was Sufficient Evidence of Causation as to Count 21.*

Appellant also contends there was insufficient evidence of causation as to count 21 (in which S.M. is the victim.) He claims Kimberly M., not appellant, moved S.M. to the corner, and there was no compulsion by appellant.[4] We conclude otherwise.

Penal Code section 209, subdivision (b)(1), applies to "Any person who *kidnaps* or carries away any individual to commit . . . , oral copulation[.]" (Italics added.) Penal Code section 207, subdivision (a), states that "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into . . . another part of the same county, is guilty of kidnapping." Lack of consent is generally an element of kidnapping. (*People v. Hill* (2000) 23 Cal.4th 853, 855.)

In *People v. Oliver* (1961) 55 Cal.2d 761, our Supreme Court, focusing on the issue of consent, "construe[d] section 207 'as applied to a person forcibly taking and carrying away another, who by reason of immaturity or mental condition is unable to give his legal *consent* thereto, . . . [to constitute] kidnaping only if the taking and carrying

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[4] During jury argument concerning count 21, appellant's counsel argued, "[T]he defendant did not move [S.M.]. . . . [T]he suspect told Kimberly: 'Move to the corner.' It was [Kimberly M.] who went and picked up her daughter. [¶] Rightfully so, folks, . . . I would expect anybody to do that. Don't get me wrong. . . . I'm just trying to analyze the facts as it relates to the law. [Kimberly M.] caused the movement, not the suspect . . . ."

away is done for an illegal purpose or with an illegal intent.' (*People v. Oliver*, *supra*, 55 Cal.2d at p. 768)" (*In re Michele D.* (2002) 29 Cal.4th 600, 607, italics added.)

In *Michele D.*, our Supreme Court, focusing on force, stated, ". . . the consent and force elements of kidnapping are clearly intertwined. (*People v. Moya* (1992) 4 Cal.App.4th 912, 916 ['If a person's free will was not overborne by the use of force or the threat of force, there was no kidnapping'].) If, as we observed in *Oliver*, the child victim went 'willingly' with defendant, the implication is that force was not used against him. Thus, our holding in *Oliver*--that, where the victim by reason of youth or mental incapacity can neither give nor withhold consent, kidnapping is established by proof that the victim was taken for an improper purpose or improper intent--was reasonably extended in [appellate cases] to encompass situations in which, because of the victim's youth, there is no evidence the victim's *will was overcome by force*." (*In re Michele D., supra,* 29 Cal.4th at p. 609, italics added; see Pen. Code, § 207, subd. (e)[5].)

Clearly, the concepts of lack of consent, force, *and the overcoming of the victim's will (compulsion)* are intertwined. Where the victim, by reason of youth or mental incapacity can neither give nor withhold consent, kidnapping is established by proof that the victim was taken for an improper purpose or improper intent, even if, because of the victim's youth, there is no evidence of compulsion, that is, that the *victim's will was overcome* by force.

There is no dispute that, by reason of S.M.'s youth, all that was necessary to kidnap her was for someone to take and carry her away for an illegal purpose or illegal intent, and that this would suffice as against claims she was not moved or there was no compulsion. Nor is there any dispute that, if appellant took and carried away S.M., he

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[5] Penal Code section 207, subdivision (e), states, "For purposes of those types of kidnapping requiring force, the amount of force required to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent."

did so with an illegal purpose or illegal intent.[6] The remaining issue is therefore one of causation, that is, whether appellant caused the taking and carrying away of S.M.

S.M. did not move herself to the corner. Appellant told Kimberly M. at gunpoint to move to the corner, and it was only thereafter that Kimberly M. grabbed S.M. and took her to the corner with Kimberly M. Appellant conceded to the jury that Kimberly M. rightly did so and appellant would have expected anyone to do what she did. The jury reasonably could have concluded Kimberly M. moved S.M. to protect her young daughter from appellant and/or from harm that might result if S.M. were unsupervised. Appellant, in his reply brief, appears to concede Kimberly M. acted based on her "maternal instincts."

We conclude Kimberly M.'s taking and carrying away of S.M. was an intervening cause which was a normal and (eminently) foreseeable result of appellant's intentional criminal act, and that appellant's intentional criminal act was also a substantial factor in bringing about the taking and carrying away of S.M. That is, Kimberly M.'s act was a dependent intervening cause which did not absolve appellant of criminal liability for the taking and carrying away of S.M. (Cf. *People v. Schmies* (1996) 44 Cal.App.4th 38, 46-50, 55-58.)

4. *No Prosecutorial Misconduct Occurred.*

Appellant claims the prosecutor committed misconduct during his closing jury argument. We set forth below each alleged instance of misconduct in the order appellant refers to them, followed by our analysis.

a. *Alleged Appeal to Sympathy.*

During the People's closing argument, the prosecutor commented she was not a good artist, then the following occurred: "[The Prosecutor]: *Dog and pony show*. [¶] *I always get so angry when it's the attack-the-police strategy, because I've known five*

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[6] Even if appellant's improper purpose or improper intent was directed at Kimberly M. and not S.M., this does not affect the analysis. (*People v. Hill*, *supra*, 23 Cal.4th at p. 858.)

officers killed in the line of duty. [¶] [Defense Counsel]: Objection, your Honor. Objection. This is improper argument. [¶] The Court: Overruled. [¶] [The Prosecutor]: *So when I hear experienced officers attacked in their integrity, it makes me very, very angry.* [¶] [Defense Counsel]: May I have a running objection to this argument? [¶] The Court: Yes. [¶] [The Prosecutor]: *So counsel can attack the police, because what he wants to do is distract you from the facts.* He doesn't want you to think of the six-pack I.D.'s which were shown to these witnesses before the defendant was ever talked to. He doesn't want you to remember all the DNA matches at 13 -- I don't have enough fingers -- loci, which means it is impossible, basically, for anybody else on the face of the earth to have that DNA. [¶] Remember that evidence before we consider anything about the defense argument."

Appellant claims the above italicized prosecutorial comments improperly appealed to the jury's sympathy and were not justified by appellant's argument. We disagree. The prosecutor was entitled to challenge and criticize defense tactics. Similar prosecutorial comments have been found not to be misconduct. (Cf. *People v. Demetrulias* (2006) 39 Cal.4th 1, 31-32; *People v. Hillhouse* (2002) 27 Cal.4th 469, 502; *People v. Cunningham* (2001) 25 Cal.4th 926, 1002-1003; *People v. Cummings* (1993) 4 Cal.4th 1233, 1302 & fn. 47; *People v. Marquez* (1992) 1 Cal.4th 553, 575-576; *People v. Breaux* (1991) 1 Cal.4th 281, 305-306; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1781.)

b. *Alleged Matters Outside the Record.*

The prosecutor later argued concerning the DNA evidence, "Don't be misled by the defense arguing, 'Oh, well, you know, this is technology that was developed in the '70s.' Well, actually, I can remember as a child looking at *Life* magazine in the '50s, and I believe it was Watson and Crick who were the discoverers of the whole DNA molecule, who discovered it in the '50s, because it was on the cover of *Life* magazine. And I remember that quite well. So it's not brand new technology, it is 50 years old."

Appellant claims the prosecutor impermissibly argued matters outside the record. The claim is unavailing since appellant neither objected to the argument nor requested a

jury admonition. (*People v. Mincey* (1992) 2 Cal.4th 408, 471.) Moreover, the thrust of the prosecutor's comment pertained to when DNA was discovered. The prosecutor was entitled to state matters which were common knowledge. (Cf. *People v. Dickey* (2005) 35 Cal.4th 884, 915.)

The prosecutor also argued, "The defense made a big deal about this Arizona study where, well, one individual was Black and one was White and so they are apparently unrelated and, therefore, the fact that they matched at nine loci, although not at the other four, means, oh, it must be much more common than we think. [¶] Well, the word to remember is 'apparently unrelated.' Because I think we all know that Thomas Jefferson has both Black and White offspring. That's pretty -- I mean we've seen the movie, we've heard the television stuff. [¶] So just because one person appears Black and one person appears White doesn't mean they can't be related."

Appellant again appears to claim the prosecutor impermissibly argued matters outside the record. The claim is unavailing since appellant neither objected to the argument nor requested a jury admonition. Moreover, the thrust of the prosecutor's comment to which appellant apparently objects was that Jefferson fathered children of different races. The prosecutor was entitled to state matters which were common knowledge.

c. *Alleged Vouching for Witnesses.*

The prosecutor argued concerning appellant's statements to police, "And you know what? It does make sense to me that Detective Prestwich would want to get it on tape, because there were so many incidents, so many people, so many facts to try and keep straight." The prosecutor later argued, "And remember, it's not just Detective Prestwich that testified there wasn't coercion or threats or any of that. Detective Sheppard also testified that there wasn't any such thing. [¶] And are you going to believe the testimony of two officers that have no reason to come in here and lie or that of a multiple-convicted felon?"

Appellant appears to claim as to each of the above two arguments that the prosecutor impermissibly vouched for police witnesses. The claim is unavailing since

appellant neither objected to the argument nor requested a jury admonition. Moreover, where, as here, a prosecutor's assurances regarding the apparent honesty or reliability of a witness are based on the facts established by the record and the inferences reasonably drawn therefrom, the comments cannot be characterized as improper vouching. (Cf. *People v. Frye* (1998) 18 Cal.4th 894, 971.)

d. *Comment On Defense Tactics.*

The prosecutor argued, "And, ladies and gentlemen, if the defense wanted to, they could have had their own DNA expert testify in this case." The prosecutor later argued, "As I was saying, the defense could have called their own defense expert on DNA if they had a problem with the People's . . . expert. They did not call a DNA expert."

The prosecutor subsequently argued, "Well, ladies and gentlemen, he was inferring that we didn't do a live lineup. The defense has an equal opportunity to ask for a live lineup if they thought that . . . the defendant would not be identified in the lineup. [¶] But the defense chose not to. [¶] Just as the defense chose not to call a DNA expert. Just as the defense chose not to call any other witnesses. [¶] And you know what's interesting? I don't think that the defendant's mother was attacked by the People in this case. Hasn't been attacked anywhere near the attacking that's been done, personal attacks on Detective Prestwich. [¶] But what's real interesting is we have six incidents. The defendant's mother came in to testify. And we know that they lived at the same address. Not one person came in and gave the defendant an alibi for any of the six incidents." After the last comment, appellant posed an unspecified objection which the court overruled.

Appellant appears to claim the prosecutor improperly commented on defense tactics. As to the third of the above three arguments, the claim is unavailing since appellant neither objected to the argument nor requested a jury admonition. As to all three arguments, the prosecutor was entitled to comment, as she did here, on the state of the evidence and the failure of the defense to introduce material evidence or to call logical witnesses. (*People v. Medina* (1995) 11 Cal.4th 694, 755.) This principle extends

to comment on any failure by appellant to request a live lineup. (*People v. Lewis* (2004) 117 Cal.App.4th 246, 256-258.)

e. *Comment Regarding Defense Counsel.*

The prosecutor commented, "Then the defense talked about the confession and said, it's like 'A Tale of Two Cities.' Well, he's pretty much as bad at English literature as he is at DNA, because 'A Tale of Two Cities' had nothing to do with two versions. It had to do with two cities, Paris and London. That's what the two cities refers to."

Appellant appears to argue that, in the above comments, the prosecutor impermissibly impugned defense counsel. The claim is unavailing since appellant neither objected to the argument nor requested a jury admonition. Moreover, the prosecutor's literary comments referred to matters of common knowledge, and her remarks were a fair response to defense argument that, like the "Tale of Two Cities," there were two versions of appellant's statements to police (the police version and appellant's version).

f. *Prosecutorial Emotion.*

Finally, appellant claims the prosecutor cried during argument and thereby impermissibly interjected sentiment into the proceedings. The record fails to demonstrate the prosecutor cried or interjected said sentiment. In any event, an argument may not give the impression that emotion may reign over reason, present inflammatory rhetoric that diverts the jury's attention from its proper role, or invite an irrational and purely subjective response (*People v. Lewis* (1990) 50 Cal.3d 262, 284.) Nonetheless, counsel may argue the evidence "emotionally and vividly . . . using terms that might be thought melodramatic or theatrical." (*People v. Ochoa*, *supra*, 9 Cal.4th at p. 463.) The record fails to demonstrate prosecutorial misconduct on this issue.

In sum, appellant has waived various issues he now raises and, in any event, he has failed to demonstrate prosecutorial misconduct because he has not shown deceptive or reprehensible methods by the prosecution, or that the trial was infected with unfairness resulting in a conviction that denied appellant due process. (Cf. *People v. Kennedy* (2005) 36 Cal.4th 595, 625-626.)

5. *Imposition of Additional $20 Court Security Fees Is Mandatory.*

At sentencing, the trial court, according to the reporter's transcript, imposed a single $20 court security fee pursuant to Penal Code section 1465.8, subdivision (a)(1). The abstracts of judgment reflect that as to each of 14 of appellant's current convictions, the court imposed such a security fee, resulting in a total of $280 for court security fees.

Respondent claims that since appellant suffered 38 current convictions, the court should have imposed 38 court security fees, one for each conviction, and the abstracts of judgment should so reflect. Penal Code section 1465.8, subdivision (a)(1) says, in relevant part, "To ensure and maintain adequate funding for court security, a fee of twenty dollars ($20) shall be imposed on *every conviction* for a criminal offense, . . ." (Italics added.) Respondent is correct. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) We will modify the judgment accordingly.

DISPOSITION

The judgment is modified by imposing 37 additional $20 Penal Code section 1465.8, subdivision (a)(1) court security fees and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting imposition of a total of 38 Penal Code section 1465.8, subdivision (a)(1) court security fees.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.